(3)

No. 05-1307

Supreme Court, U.S.
FILED
JUN 14 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BANCO PANAMERICANO, INC., *et al.*,

Petitioners,

v.

CHASTANG LANDFILL, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS CHASTANG LANDFILL, INC., WASTE MANAGEMENT HOLDINGS, INC., AND CONSORTIUM SERVICES MANAGEMENT GROUP

PHILIP L. COMELLA
Counsel of Record
DAVID J. REIER
LAWRENCE P. POSTOL
SEYFARTH SHAW LLP
55 E. Monroe Street
Suite 4200
Chicago, IL 60603
(312) 346-8000

JOHN VAN GESSEL
GROUP GENERAL COUNSEL
WASTE MANAGEMENT
Suite 1600
2859 W. Paces Ferry Road
Atlanta, GA 30339
(770) 805-3350

Attorneys for Respondents Chastang Landfill, Inc. and Waste Management Holdings, Inc.

WILLIAM I. KOHN
BENESCH FRIEDLANDER
COPLAN & ARONOFF LLP
2300 BP Tower
200 Public Square
Cleveland, OH 44114-2378
(216) 363-4182

Attorneys for Respondent Consortium Services Management Group

SUPREME COURT RULE 29.6 DISCLOSURE STATEMENT

Waste Management, Inc., a publicly-traded corporation, is the parent corporation of Respondent, Waste Management Holdings, Inc. Waste Management Holdings, Inc. is the parent corporation of Waste Away Group, Inc., which in turn is the parent corporation of Respondent Chastang landfill, Inc. No publicly-held company owns 10% or more of the stock of Waste Management, Inc.

Consortium Service Management Group, Inc. ("CSMG") is a public company doing business as CSMG Technologies, Inc. and is otherwise not affiliated with any other public companies. There is no parent and no entity, public or otherwise, holds 10% or more of the stock of Consortium Service Management Group, Inc.

TABLE OF CONTENTS

	Page
Supreme Court Rule 29.6 Disclosure Statement ...	i
Table of Contents	ii
Table of Cited Authorities	iv
I. Introduction	1
A. Summary of Reasons for Denying Petition ...	1
B. Misstatements of Fact in Petition for a Writ of Certiorari	2
C. Supplementary Background Information ...	3
II. Federal Circuit Courts Agree That Rejection Under Section 365, Not Abandonment Under Section 554, Provides The Mechanism For Removing Burdensome Executory Contracts From An Estate.	4
III. Since The Contract Had Been Assumed By The Debtor-In-Possession, It Became Binding On The Estate And Thus, This Is Not An Appropriate Case To Decide Whether A Debtor Can Abandon An Executory Contract Without Rejecting It. ..	7
IV. Petitioners' Interpretation Of The Bankruptcy Code Creates A Statutory Conflict.	8

Contents

Page

V. The Remaining Issues And Arguments Raised By Petitioners Are Besides The Point And Do Not Merit Consideration. 11

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

CASE LAW

Cheadle v. Appleatchee Riders Ass'n (In re Edward Hill Lovitt), 757 F.2d 1035 (9th Cir. 1985) 4

Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222 (1957) 11

In re Argonaut Fin'l Servs., Inc., 164 B.R. 107 (Bankr. N.D. Cal. 1994) 5, 6

In re Austin Development, 19 F.3d 1077 (5th Cir.), *cert. denied*, 513 U.S. 874 (1994) 6

In re Bernard, 69 B.R. 13 (Bankr. D. Hawaii 1986) .. 6

In re Joshua Slocum Ltd., 922 F.2d 1081 (3d Cir. 1990) 8

In re Kmart Corp., 290 B.R. 601 (Bankr. N.D. Ill. 2002) 5

In re Resource Tech. Corp., 430 F.3d 884 (7th Cir. 2005) 7

In re Tama Beef Packing, Inc., 277 B.R. 407 (Bankr. N.D. Iowa 2002) 5

In re Trans World Airlines, Inc., 261 B.R. 103 (Bankr. D. Del. 2001) 5

Cited Authorities

Page

Midlantic Nat. Bank v. New Jersey Dept., 474 U.S. 494 (1986) 10

Morton v. Mancari, 417 U.S. 535 (1974) 11

N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513 (1984) 5, 9

Orion Pictures Corp. v. Showtime Networks (In re Orion Pictures Corp.), 4 F.3d 1095 (2d Cir. 1993) 4

Sipes v. General Dev. Corp. (In re General Dev. Corp.), 84 F.3d 1364 (11th Cir. 1996) 4

STATUTES

11 U.S.C. § 363 (2005), Use, sale, or lease of property 11, 12

11 U.S.C. § 365 (2005), Executory contracts and unexpired leases ..... *passim*

11 U.S.C. § 554 (2005), Abandonment of property of the estate ..... *passim*

Page

OTHER AUTHORITIES

Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. Colo. L. Rev. 845 (1988) 10

3 COLLIER ON BANKRUPTCY ¶ 365.09[5] (15th ed. rev. 2005) 4, 9

I. INTRODUCTION

A. Summary of Reasons for Denying Petition

The underlying decision of the United States Court of Appeals for the Seventh Circuit does not conflict with the decision of any other federal circuit court. Nor does the *Petition for a Writ of Certiorari* meet any other standard governing review by this Court. Rather, the bankruptcy court applied a single, well-grounded bankruptcy principle to the facts: executory contracts are "abandoned" by the bankruptcy estate through the contract rejection provisions contained in Section 365 of the Bankruptcy Code, not through the property abandonment provisions of Section 554 of the Code. The Petitioners' contentions to the contrary, the bankruptcy court's application of this principle to the facts presented does not warrant review by this Court.

Petitioners would urge this Court to adopt the novel theory that executory contracts, even those assumed by the bankruptcy estate can, as an alternative, be abandoned under Section 554 of the Code, thereby avoiding the rejection and breach provisions of Section 365. Any such theory conflicts with elementary principles of statutory construction, fails to further the goals of the bankruptcy law, and leads to a conflict between two otherwise consistent provisions The Petitioners endorse this theory because they seek to avoid complying with Section 365, including provisions protecting non-debtor contracting parties such as Chastang. This set of circumstances is hardly one appropriate for review by this Court.

B. Misstatements of Fact in Petition for a Writ of Certiorari

The Petitioners' *Statement of the Case* contains a number of misstatements that should be corrected. The Petitioners claim, at page 3 of their *Petition*, that they "conducted business"[1] at the Chastang Landfill in Mount Vernon, Alabama. This is wrong. Evidence presented at the hearing before the bankruptcy court showed beyond dispute that RTC never delivered or sold any landfill gas to an end-user and also failed to install the necessary equipment to allow the gas scrubber to commence operations. (Trans. Vol. I, J. Connolly, 171-72; G. Szilagyi, at 55-56; D. Robbins, at 106-07, Item 7, Ex. 2, DC Docket #7; Requests for Admission, Nos. 6-10; 13-17; 21, Item 2, Ex. 21.)[2] Chastang terminated the agreement because of RTC's failure to conduct any business at the landfill. (Trans. Vol. I, J. Van Gessel, at 132-33, Item 7, Ex. 2; and Item 2, Ex. 8.)

The Petitioners also wrongly claim that they "hold a first priority lien on virtually all of the Debtor's gas collection assets generally, and including those at the Chastang Facility."

1. Petitioners make the same misstatement at page 10 where they claim that RTC's "business concerned operating under landfill gas agreements, such as the Chastang Landfill Gas Agreement." This may have been in RTC's business plan, but they did not execute it.

2. This brief follows the following format for citations to the record: (1) citations to trial or record exhibits will be to the Item No. on the district court record transmittal and the Exhibit No.; e.g., "Item 7, Ex. 4;" (2) "BR Docket" and "DC Docket" refer to the bankruptcy court and district court dockets, respectively, as contained in Vol. 1 of 2 of the Record on Appeal in the Seventh Circuit; (3) Transcript of Proceedings is found at Item 7, Ex. 2; DC Docket # 7 (hereinafter, Trans. Vol. "x", at "y.") (Transcript is also at Item 2, Ex. 22).

In fact, in 2002, the Petitioners subordinated their lien on the gas collection system and "all products and proceeds thereof" to Chastang. (Item 2, Ex. 5, Security Agreement; and Item 2, Ex. 6, Lien Subordination Agreement.)

C. Supplementary Background Information

The decision of the Seventh Circuit Court of Appeals aptly summarizes the factual and procedural background. However, it is worth noting why the Petitioners are seeking authority for the trustee to abandon an assumed executory contract without following the formal rejection provisions of Section 365 of the Code. When the debtor-in-possession assumed the gas collection agreement as part of the first court-approved post-petition settlement, the parties expressly agreed that "if [Resource Technology Corporation] or any party acting on its behalf moves to reject the Settlement Agreement or the Agreement or any part or aspect thereof," then the promissory note would become immediately due and payable without notice. (Item 2, Ex. 3, Promissory Note.) Collectively, the documents comprising that settlement agreement provided that failure to make payment on the note would give Chastang the right to terminate the Agreement. (*Id.; see also* Item 2, Ex. 2, Amendment, ¶ 20(f).) A trustee's rejection of an assumed, executory contract is a breach of contract, with damages treated as a first priority administrative expense. 11 U.S.C. § 365(g) (2005). Thus, the trustee's rejection of the gas collection agreement would have resulted in potentially millions of dollars of administrative expense claims and would have *ipso facto* justified termination of the contract. The central issue in this matter is whether a creditor can compel the trustee to use Section 554's property-abandonment provisions to evade this result.

II. FEDERAL CIRCUIT COURTS AGREE THAT REJECTION UNDER SECTION 365, NOT ABANDONMENT UNDER SECTION 554, PROVIDES THE MECHANISM FOR REMOVING BURDENSOME EXECUTORY CONTRACTS FROM AN ESTATE.

All other federal circuit courts that have addressed the issue agree with the Seventh Circuit that rejection under Section 365 of the Bankruptcy Code is the proper mechanism for abandoning an executory contract. *See, e.g., Sipes v. General Dev. Corp. (In re General Dev. Corp.)*, 84 F.3d 1364, 1375 (11th Cir. 1996) ("Section 365 enables the bankruptcy trustee to affirm or reject leases and executory contracts, and is based on the trustee's long-standing power to abandon obligations burdensome to the estate") (citations omitted); *Orion Pictures Corp. v. Showtime Networks (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098 (2d Cir. 1993) ("purpose behind allowing the assumption or rejection of executory contracts is to permit the trustee or debtor-in-possession to use valuable property of the estate and to 'renounce title to and abandon burdensome property'") *quoting* 2 COLLIER ON BANKRUPTCY ¶ 365.01[1] (15th ed. 1993); *Cheadle v. Appleatchee Riders Ass'n (In re Edward Hill Lovitt)*, 757 F.2d 1035, 1041 (9th Cir. 1985) ("trustee's power to reject those executory contracts which he finds burdensome to the bankrupt's estate is an extension of his power to renounce title to and abandon burdensome property which is already a part of the estate").

Lower courts are also in accord with the principle that rejection through Section 365 is the proper vehicle for abandoning executory contracts. For example, after surveying numerous decisions in multiple jurisdictions throughout the

country, one bankruptcy court concluded that "[t]he weight of authority holds that when a trustee rejects an executory contract or unexpired lease pursuant to section 365(d) of the Code, the bankruptcy estate effectively abandons its interest in it." *In re Kmart Corp.*, 290 B.R. 601, 611 (Bankr. N.D. Ill. 2002) (citations omitted). *See also In re Tama Beef Packing, Inc.*, 277 B.R. 407, 413 (Bankr. N.D. Iowa 2002) (*quoting Orion*); *In re Trans World Airlines, Inc.*, 261 B.R. 103, 117 (Bankr. D. Del. 2001) ("the ability to reject an executory contract is rooted in the principle of maximizing the return to creditors by permitting a debtor in possession to renounce title to and abandon burdensome property if such action is in the best interests of the estate.")

This Court itself has observed that the language of Section 365(a) "by its terms includes all executory contracts except those expressly exempted[.]" *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 521 (1984) (rejection of collective bargaining agreement permissible if debtor can show that labor agreement burdens estate). The specific, inclusive treatment of executory contracts under Section 365 rules out the use of Section 554 for abandoning the same contracts.

To support their position that Section 554 of the Code provides an optional method to abandon an executory contract, the Petitioners are left to cite dicta from two lower court decisions. *Petition*, pp. 13-14. Neither case is on point or authoritative.

In one case, *In re Argonaut Fin'l Servs., Inc.*, 164 B.R. 107 (Bankr. N.D. Cal. 1994), certain investors, who were assignees of a creditor to the debtor, Argonaut, claimed they did not receive notice of the debtor's bankruptcy proceeding in time to file an objection to the automatic rejection of a

leasehold interest under Section 365(d)(4) of the Code. The investors had been assigned fractional shares of certain notes and trusts securing the creditor's loan to the debtor. The court held that the debtor's failure to give the assignees notice violated the Due Process Clause, and gave the assignees 60 additional days to file objections to the lease rejection. *Id.* at 115. In dicta, the court suggested that the investors could bring a Section 554 motion to compel abandonment or some other motion. *Id.* at 116. In all events, there was no Section 554 abandonment of an executory contract in that case.

Similarly, in *In re Bernard*, 69 B.R. 13 (Bankr. D. Hawaii 1986), the court found that the rejection of a lease under Section 365(d)(4) cut off the security interest of a mortgagor. *Id.* at 15. The court, again in dicta, suggested that if a mortgagor believed it was denied adequate protection by this outcome, it could file a motion to compel abandonment under Section 554. *Id.* at 15. Again, the court in *Bernard*, like the *Argonaut* court, suggested a form of equitable relief for secured parties based on equating rejection with termination. Since rejection should not result in termination of the security interest, *see In re Austin Development*, 19 F.3d 1077 (5th Cir. 1994), *cert. denied*, 513 U.S. 874 (1994), the courts' suggestions are irrelevant. In sum, the Petitioners have provided no case law supporting their theory that an assumed executory contract can be subsequently abandoned by the bankruptcy estate without a Section 365 rejection.

III. SINCE THE CONTRACT HAD BEEN ASSUMED BY THE DEBTOR-IN-POSSESSION, IT BECAME BINDING ON THE ESTATE AND THUS, THIS IS NOT AN APPROPRIATE CASE TO DECIDE WHETHER A DEBTOR CAN ABANDON AN EXECUTORY CONTRACT WITHOUT REJECTING IT.

Even if this Court decided that the question whether an executory contract can be abandoned through Section 554 is worthy of review, this case is not an appropriate vehicle to consider that question. Here, the trustee had assumed the gas collection contract, and it therefore was already binding on the bankruptcy estate by the time the Petitioners proposed that it be abandoned under Section 554. As the Seventh Circuit observed,

> Resource Technology had a duty to complete the gas-collection system; it had a right to collect the gas only after fulfilling that duty. When the lenders asked the Trustee to "abandon" the contract, Resource Technology had not finished the collection system. Abandonment then would have been nothing but breach; and if Resource Technology repudiated its promise (already broken by delay), it would have lost any right to the gas.

In re Resource Tech. Corp., 430 F.3d 884, 887 (7th Cir. 2005). Petitioners are unable to cite a single bankruptcy decision in any jurisdiction suggesting even in dicta that a bankruptcy trustee can abandon through Section 554 an executory contract after it has been assumed by the estate. Were this

proposition accepted, there would be no risk to a trustee in assuming an executory contract because the estate could then simply abandon it later with impunity.

The trustee had assumed the gas collection agreement. Since that fact figures prominently in the bankruptcy court's decision to reject the Petitioners' alternative settlement offer, the unique facts of this case militate against using this case to review the issue which the Petitioners urge this Court to consider.

IV. PETITIONERS' INTERPRETATION OF THE BANKRUPTCY CODE CREATES A STATUTORY CONFLICT.

Petitioners argue that a trustee has the option of removing an assumed, executory contract from a bankruptcy estate contract either through the assignment and rejection provisions of Section 365 of the Code, or through the abandonment provisions of Section 554. This reading of the Code creates a statutory conflict.

Section 365 provides a comprehensive scheme for a trustee's administration of a special asset class to which the gas collection contract at issue belongs — executory contracts. It attempts to balance the rights of the debtor and non-debtor. *See In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1091 (3rd Cir. 1990) (bankruptcy court must be sensitive to the rights of the non-debtor contracting party and the policy requiring that the non-debtor receive the full value of his bargain). In contrast, Section 554 applies to property of the estate that is either burdensome or of inconsequential value.

Section 554 nowhere mentions contracts, in stark contrast to their comprehensive treatment under Section 365. *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 521 (language of Section 365(a) "by its terms includes all executory contracts except those expressly exempted").

Section 365(f)(2) requires that as a condition to assigning an assumed executory contract, the assignee must provide adequate assurance of future performance. Under Section 365(g), the rejection by a trustee of an assumed, executory contract constitutes a breach of contract, with damages flowing from the breach considered first priority administrative expenses. *See* 3 COLLIER ON BANKRUPTCY ¶ 365.09[5], at 365-80 (15th ed. 2005). No similar provisions can be found in Section 554. Therefore, under the Petitioner's theory, if a trustee were to abandon an assumed executory contract under Section 554, the non-debtor party would lose the protections built into Section 365. Specifically, the non-debtor would have no assurance that the recipient of the abandoned contract could actually perform under the contract.

The Petitioners want nothing less than to read Section 365 out of the Bankruptcy Code and allow a trustee to divest the estate of an executory contract by abandoning it like an old refrigerator, where the rights of a third party are not implicated. It is for this reason, as noted above, that courts uniformly hold that a trustee divests the estate of a burdensome contract through the specific provisions of Section 365, not by the general abandonment power under Section 554.

If both Sections 554 and 365 apply to executory contracts, there would be a conflict between them. However, the language and history of Sections 365 and 554 show that

the two provisions are not in conflict: Section 365 applies to executory contracts and unexpired leases; Section 554 applies to other property. A trustee's statutory power to reject executory contracts pre-dated his statutory power to abandon burdensome property. As former Chief Justice Rehnquist observed in his dissenting opinion in *Midlantic Nat. Bank v. New Jersey Dept.*, 474 U.S. 494 (1986),

> Prior to enactment of the Bankruptcy Code in 1978, there was no statutory provision specifically authorizing abandonment in liquidation cases. *By analogy to the trustee's statutory power to reject executory contracts*, courts had developed a rule permitting the trustee to abandon property that was worthless or not expected to sell for a price sufficiently in excess of encumbrances to offset the costs of administration.

Id. at 508 (emphasis added). A similar point is made by a commentator who observes that, "the doctrine of 'abandonment' of assets *other than contracts and leases*, which became statutory only in the Bankruptcy Code evolved in the U.S. from contract and lease cases, not *vice versa*." Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. COLO. L. REV. 845, 863 n.80 (1988) (emphasis added).

Section 554 evolved as a mechanism for abandoning assets other than executory contracts and leases, not as an alternative mechanism for abandoning executory contracts and leases. To conclude that Section 554 now applies to executory contracts is to ignore the principle of statutory construction that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified

by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Moreover, as this Court noted in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957) "[h]owever inclusive may be the general language of a statute, 'it will not be held to apply to a matter specifically dealt with in another part of the same enactment * * * Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" *Id.* at 228-29 (citations omitted).

V. THE REMAINING ISSUES AND ARGUMENTS RAISED BY PETITIONERS ARE BESIDES THE POINT AND DO NOT MERIT CONSIDERATION.

The Petitioners argue that the Seventh Circuit erred in allegedly holding that Section 363(f) of the Bankruptcy Code does not protect so-called "floating liens." The Petitioners' argument is a *non-sequitor*. Section 363(f) does not apply to this transaction because the bankruptcy trustee was not selling property; he was conceding termination of a contract in connection with the settlement of a dispute. As the Seventh Circuit pointed out, even assuming that Petitioners had a lien on the contract based upon State law, the debtor could equally have entered into an agreement with a contract counter-party to terminate the contract without the consent of its lenders. 430 F.3d at 888. While the lien might have attached to the settlement proceeds, the lenders could not have blocked the settlement or termination of the contract.

The Petitioners assert that the Seventh Circuit held that the Chastang settlement was "made in the ordinary course of business." *Petition*, pp. 9-10. This is an overly imaginative reading of the Seventh Circuit's decision. Nowhere does the

Seventh Circuit state that the Chastang settlement was made in the "ordinary course of business." That is a term of art under Section 363. A bankruptcy trustee is free to conduct affairs in the ordinary course of business; matters outside of the ordinary course require approval of the bankruptcy court. All the Seventh Circuit stated was that a borrower is free to transact business, including settling disputes, without the consent of its lenders. Of course, in bankruptcy, settlements require bankruptcy court approval and the Seventh Circuit never held otherwise.

Petitioners' references to contracts "riding through" bankruptcy are also misplaced and beside the point. Contracts said to "ride through" bankruptcy are not abandoned pursuant to Section 554. More importantly, in this case, the contract had been assumed. Therefore, the entire "riding through" doctrine—dealing with contracts that are neither assumed nor rejected—is simply inapplicable.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

PHILIP L. COMELLA
Counsel of Record
DAVID J. REIER
LAWRENCE P. POSTOL
SEYFARTH SHAW LLP
55 E. Monroe Street, Suite 4200
Chicago, IL 60603
(312) 346-8000

JOHN VAN GESSEL
GROUP GENERAL COUNSEL
WASTE MANAGEMENT
Suite 1600
2859 W. Paces Ferry Road
Atlanta, GA 30339
(770) 805-3350

Attorneys for Respondents
Chastang Landfill, Inc. and
Waste Management Holdings, Inc.

WILLIAM I. KOHN
BENESCH FRIEDLANDER
COPLAN & ARONOFF LLP
2300 BP Tower
200 Public Square
Cleveland, OH 44114
(216)363-4182

Attorneys for Respondent
Consortium Services
Management Group